No. 12827

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LEO KATZ, MINDA KATZ, OTTO KATZ, LEEMOND KATZ, PHIL KATES, DOROTHY KATES, ELY ELIAS, BERTHA ELIAS, JULIAN ELIAS AND WALTER L. KERN d/b/a LEE'S DEPARTMENT STORE,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for Review of an Order of the National Labor Relations Board.

BRIEF FOR PETITIONERS.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

PAGE

STATUTES

MISCELLANEOUS PAGE

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BRIEF FOR PETITIONERS.

Jurisdiction.

This case is before the Court on petition of the above-named Petitioners, doing business as Lee's Department Store, for a review of the order of the National Labor Relations Board, Respondent herein (hereinafter referred to as the Board), pursuant to Section 10(f) of the National Labor Relations Act, as amended [61 Stat. 136, 29 U. S. C. Supp. III, Secs. 151 *et seq.*] (hereinafter referred to as the Act). The jurisdiction of this Court is based upon Section 10(f) of said Act. Petitioners are co-partners doing business as Lee's Department Store in the City of Huntington Park, County of Los Angeles, State of California, where the alleged unfair labor practices are asserted to have occurred.

The decision and order of the Board is set forth at pages 100-111 of the record. The consolidated complaint and the amendment thereto issued by the Board under which it held hearings and entered its order are set forth at pages 14-21 and 28-29, respectively, of the record. Petitioners' answer to the consolidated complaint and its amended answer to the consolidated complaint, as amended, are set forth at pages 26-27 and 29-33, respectively, of the record.

Statement of the Case.

On the 4th day of October, 1950, the Board issued its Decision, Findings of Fact, Conclusions of Law, and Order [91 N. L. R. B. No. 106, R. 100-111]. Its Findings and Conclusions, relative to these Petitioners, may be summarized as follows: The Board has jurisdiction over Petitioners because of their "participation in an association-wide bargaining group of employers, whose total volume of operations substantially affect commerce within the meaning of the Act"; Petitioners violated Section 8(a)(1), (2), and (3) of the Act for the reason that Petitioners "unlawfully enforced the illegal union-security (*sic*) provision" of a collective bargaining agreement executed December 17, 1948, between Petitioners and the Amalgamated Clothing Workers of America, Local Union No. 81, C. I. O. (hereinafter called the Amalgamated). The Board found that Petitioners had not, as charged in the consolidated complaint, committed any unfair labor practices by checking off Amalgamated dues from the pay of their employees.

The Board ordered Petitioners [R. 108-111] to cease and desist from renewing or enforcing any agreement with Amalgamated or any other labor organization which

requires their employees to join or maintain membership in such labor organization as a condition of employment, unless such agreement has been authorized as provided in the Act; from recognizing Amalgamated as the representative of their employees unless Amalgamated shall have been certified by the Board; from performing or giving effect to the contract of December 17, 1948, or any other agreement with Amalgamated until Amalgamated shall have been certified by the Board; and in any manner from interfering with, restraining, or coercing their employees in the exercise of the right to self-organization, to form, join, or assist, Retail Clerks International Association, A. F. of L., or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid and protection or to refrain from such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act. The Board further ordered Petitioners to withdraw all recognition from Amalgamated and to post appropriate notices.

On January 27, 1951 Petitioners filed with this Court their petition to review and set aside the order of the Board [R. 112-121]. On March 13, 1951, Respondent filed its answer to the petition [R. 121-129]. In said answer, Respondent alleged that the Findings of Fact, Conclusions of Law, and Order of the Board were valid and proper under the Act, and requested this Court to enforce its order.

The pertinent provisions of the Act are set forth in Appendix "A," *infra,* pp. 39 to 44.

Specification of Errors.

Petitioners submit that the Board made the following, among others, errors in its aforesaid Findings of Fact, Conclusions of Law, Order and Decision [R. 100-111]:

(1) The Board erred (a) in determining that Petitioners were engaged in commerce within the meaning of the Act, (b) in determining that it had jurisdiction over Petitioners because of "their participation in an association-wide bargaining group of employers, whose total volume of operations substantially affect commerce," or upon any other basis, (c) in exercising jurisdiction over Petitioners, and (d) in determining that the activities of Petitioners have a close and substantial relation to interstate commerce and tend to lead to labor disputes burdening or obstructing interstate commerce; these findings and conclusions are not supported by the evidence and are contrary to law.

(2) The Board's determination and finding that Petitioners violated Section 8(a)(1), (2), and (3), or any of said sections, of the Act by "keeping in existence" and "enforcing" the alleged union-security ("seniority") provision of the contract of December 17, 1948, between Petitioners and the Amalgamated, is not supported by the evidence and is contrary to law.

(3) The Board erred in refusing to dismiss the entire proceedings for failure of the General Counsel to join in an indispensable party in the proceedings below, as a party respondent, to wit, the Amalgamated.

ARGUMENT.

I.

The Board Erred in Determining That It Had Jurisdiction and in Attempting to Exercise Jurisdiction Over Petitioners' Operations.

A. The Business of Petitioners.

The undisputed facts bearing upon the jurisdictional question are as follows:

Petitioners operate a small department store, called Lee's Department Store, in Huntington Park, California which has the following departments: men's, women's, and children's apparel, jewelry, houseware, furniture and appliances, and shoes [General Counsel's Exs. 1-J, 1-U, R. 14, 29; R. 272]. Huntington Park is a small community, with a population of 28,648 according to the 1940 census, located near Los Angeles. The store employs about 60 full time employees [R. 273]. During the year ending November 24, 1948, Lee's Department Store purchased equipment, materials, supplies and merchandise of a value of approximately $1,000,000, of which 30 per cent or $300,000 in value, originated outside of California [General Counsel's Ex. 1-U, R. 29]. The store's sales are all to residents of the Southern California area, and it ships no merchandise out of this State [R. 287], as corrected by Stipulation correcting Record [R. 131]. From 70 to 75 per cent of its sales are made on credit [R. 273].[1] In brief, Petitioners are engaged in making retail sales, mostly on credit, of personal apparel and household merchandise to residents

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[1]Such sales do not necessitate out of state credit information [R. 252].

of the Huntington Park area at a single, small retail store in that community.

B. Statutory Basis and Limitation of Board's Jurisdiction.

The jurisdiction of the Board is bottomed on Article I, Section 8, Clause 3 of the Constitution of the United States which gives to the Congress of the United States power "to regulate commerce . . . among the several states". Section 10(a) of the Act gives to the Board jurisdiction to prevent a person "from engaging in any unfair labor practice affecting commerce". The scope of the Board's jurisdiction is delineated in Section 2 of the Act, which provides:

> "(6) The term 'commerce' means traffic, commerce, transportation, or communication among the several States . . .
>
> "(7) The term 'affecting commerce' means in commerce or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

The Act does not empower the Board to regulate local activities, even though such activities may have some effect on interstate commerce. Predominantly local business operations and activities are subject to regulation only by the States. This principle is made clear in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 57 S. Ct. 615 (1937), where, in holding the original National Labor Relations Act[2] [49

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[2]The definition of "commerce" and of "affecting commerce" set forth in Section 2 of the original National Labor Relations Act and the Amended Act are identical.

Stat. 449, 29 U. S. C., Supp. V, Title 29, Sec. 151 *et seq.*] constitutional under the commerce clause, the court declared (301 U. S. at 30, 31, 37; 57 S. Ct. at 621, 624):

> ". . . Undoubtedly the scope of this power [to regulate commerce] must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.
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> * * * * * * *
>
> "Its [the original Act's] terms do not impose collective bargaining upon all industry regardless of effects upon interstate commerce. It purports to reach only what may be deemed to burden or obstruct that commerce and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds.
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> * * * * * * *
>
> "The authority of the federal government may not be pushed into such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce 'among the several States' and the internal concerns of a state. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system."

In *National Labor Relations Board v. Mid-Co. Gasoline Co.,* 172 F. 2d 974 (C. A. 5th, 1951), the court observed (p. 978):

> "It is quite clear from the decision in N. L. R. B. v. Jones & Laughlin Steel Corporation, 301 U. S. 1; Consolidated Edison Company of N. Y. v. N. L. R. B., 305 U. S. 197; N. L. R. B. v. Fainblatt, 306 U. S. 601; and Wickard v. Filburn, 317 U. S. 111; that the Act does not impose collective bargaining upon all industry regardless of effects upon interstate or foreign commerce, and that in order to show that a particular operation—not itself in interstate commerce—affects such commerce in such fashion as to be subject to federal control, it must be made to appear that the business bears such a close and intimate relationship to such commerce, or has such a substantial economic effect on such commerce that a work stoppage in the employer's plant would impede, burden, or obstruct interstate commerce or the free flow thereof."

To the same effect is the decision in *National Labor Relations Board v. Baltimore Transit Co.,* 140 F. 2d 51, 54 (C. C. A. 4th, 1944), *cert. den.* 321 U. S. 795, 64 S. Ct. 847 (1944), in which the court commented:

> "The test of the Board's jurisdiction under the Act is, not whether the operations of the company constitute interstate commerce, but whether a stoppage of its operations by threatened industrial strife would result in substantial interruption to or interfere with the free flow of commerce."

Even if it can be found that Petitioners' business operations do or may affect interstate commerce in some small degree, the Board is not thereby invested with jurisdiction

over these activities. This principle was thoroughly examined and clearly applied in *National Labor Relations Board v. Shawnee Milling Company, d/b/a Pauls Valley Milling Company,* 184 F. 2d 57 (C. A. 10th, 1950). There the Board determined that the employer was subject to the Act because it was a branch of a parent company (Shawnee Milling Company) which admittedly was engaged in interstate commerce and which controlled all the policies, including labor policies, of its branch plant. Despite these facts and although the employer (branch plant) in this case was a substantial business interprise, doing approximately $1,000,000 in business annually, the circuit court held that the Board had no jurisdiction because (184 F. 2d at 59-60):

> ". . . The Board's jurisdiction does not obtain merely because a local activity may in some indirect and remote way affect commerce.
>
> * * * * * * *
>
> "[Although the parent company supervised the labor policies of the local branch plant] such supervision does not . . . mean that the officers of the Shawnee Company could not exercise its policy with respect to the Pauls Valley Plant, separate and apart from any connection with any other of Shawnee Company's plants or subsidiaries which were engaged in interstate commerce."
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> * * * * * * *
>
> "There is nothing in the record or in the stipulated facts which would warrant a finding that a labor disturbance in the Pauls Valley Plant would have an impact upon the operations at the Shawnee plant, or that the discontinuance of operations at Pauls Valley would cast an undue burden upon the operations of the plant at Shawnee."

Brown v. Retail Shoe & Textiles Salesmen's Union, 89 F. Supp. 207 (N. D. Calif., 1950), involved the very kind of small, retail department store which these Petitioners operate. In that case the Board sought an injunction in the federal District Court under Section 10(l) of the Act against a union to enjoin a secondary boycott against an employer, A. E. Cramer Inc. The employer operated two retail department stores in San Francisco, California, and annually purchased merchandise for resale having a value in excess of $240,000, approximately 60% of which was shipped from sources outside of the State of California.

The court refused to issue an injunction, on the ground that interstate commerce was not affected by the alleged unfair labor practices. Observing that "it is doubtful that the unfair labor charges affect interstate commerce in any substantial manner", the court declared (89 F. Supp. 209):

> ". . . in all the cases cited by the plaintiff where jurisdiction has been assumed by the NLRB and approved by the courts either the total volume of business or the percentage of out of state purchases was far in excess of that involved in this case. In many of the cases the retail establishment sold at least a small portion of its products across state lines. It seems clear that from the latest decisions of the NLRB that the Board considers the operations of the type involved in this case are essentially local in character and that to assert jurisdiction would not effectuate the policies of the Act."

Further, in *National Labor Relations Board v. Idaho-Maryland Mines Corp.*, 98 F. 2d 129 (C. C. A. 9th, 1939), the employer company was engaged in the production of gold, purchasing $125,000 of supplies and equipment annually from outside the state and selling annually over $3,000,000 of gold to the United States Mint at San Francisco, California. The court set aside the Board's determination that the employer was engaged in commerce within the meaning of the Act, and dismissed the petition for enforcement of the Board's order, reasoning (98 F. 2d 131):

> ". . . There is no evidence that its [employer's] activities have any close, intimate, or substantial relation to such commerce, or that such commerce or the free flow thereof would be obstructed by any dispute to which respondent's labor practices might lead."

Measured against the jurisdictional standards laid down in the Constitution and in the Act, and as more fully described in the authorities cited above, the business activities of Petitioners are of such a minor and essentially local character that they are not subject to the Board's processes or powers. The business of such a small retail department store in a small California community is not, we submit, one which "affects commerce", or which bears a "close and intimate relationship to such commerce", or in which a "work stoppage would impede, burden, or obstruct interstate commerce or the free flow thereof".

C. The Board Has Regularly Declined to Take or Exercise Jurisdiction Over Business Operations Similar to Petitioners.

In recognition of the constitutional and statutory limitations upon its power over employer-employee relations, the Board in a long line of decisions has regularly refused to attempt to assert jurisdiction over small local business enterprises. The Board in these decisions has recognized and announced the obvious fact, that an attempted exercise of jurisdiction over business operations which are essentially local in character would not effectuate the policies of the Act, even though the local activity may in some indirect and remote way "affect commerce". *Wawina Co-Op Soc.,* 79 N. L. R. B. 1243 (1948), general retail merchandise store; *Josephs,* 88 N. L. R. B. 11 (1950), retail clothing store; *Hom-Ond Food Stores,* 77 N. L. R. B. 647 (1948), a chain of 13 retail grocery stores; *Jacobs Pharmacy Co.,* 87 N. L. R. B. 309 (1949), a chain of 16 retail drug stores; *Purity Creamery Co.,* 79 N. L. R. B. 1042 (1948), a chain of 9 retail dairy stores; *A-1 Photo Service,* 83 N. L. R. B. 564 (1949), and *Sun Photo Co.,* 79 N. L. R. B. 1278 (1948), photo supplies and retail stationery; *Cordele Sash, Door & Lumber Co.,* 79 N. L. R. B. 578 (1946), lumber plant and retail lumber and hardware store; *Hubby-Reese Co.,* 72 N. L. R. B. 1404 (1947), wholesale grocery; *Olympia Stadium Corp.,* 85 N. L. R. B. 389 (1949), sports arena; *Betty & Berts,* 87 N. L. R. B. 248 (1949), market and cafe; *O'Rourke Baking Co.,* 79 N. L. R. B. 1456 (1948), wholesale baking company; *White Sulphur Springs Co.,* 85 N. L. R. B. 1487 (1949), a hotel; *Conlon Baking Co.,* 81 N. L. R. B. 934 (1949), a local baker; *Bailey Slipper Shop, Inc.,* 84 N. L. R. B. 341 (1949), retail shoe store;

Morris C. Lebowitz, 88 N. L. R. B. 11 (1950), retail clothing store.

As we have stated above, Petitioners make no out-of-state sales and of some $1,000,000 worth of purchases of merchandise, supplies and equipment, only about $300,000 originate from outside the State of California.

In a number of the cases cited above, the out-of-state volume far exceeded that involved in the instant case. Thus, in the *Conlon Baking Company* case, supplies and materials in the amount of $700,000 were purchased outside of the state. Similarly in the *Hubby-Reese Company* case, supplies and materials amounting to $345,000 were received directly from outside of the state, and $1,155,000 in purchases originated out of the state.

In *Josephs,* 88 N. L. R. B. 11 (1950), a retail men's and boy's clothing store over a seven months period had out-of-state purchases of $110,000 (amounting to $190,000 on an annual basis) and sales out-of-state in the sum of $10,000 (amounting to $17,000 on an annual basis). Similarly, in *Squires, Inc.,* 88 N. L. R. B. 8 (1950), the employer operated three retail men's clothing stores in and around Los Angeles. During a six month period, purchases in the sum of $162,400 (amounting to $324,800 on an annual basis) were shipped to the stores from outside of California; the stores had only a small amount of out-of-state sales. In both of these decisions the Board unanimously declined to take jurisdiction, all four members participating. In doing so, the Board expressly overruled the case of *King Brooks, Inc.,* 84 N. L. R. B. 652 (1949), in which jurisdiction had been taken over a retail clothing and furnishing store with annual out-of-state purchases of $378,000. Subsequently in *Evans Fur Co.,* 88 N. L. R. B. 1095 (1950), the Board de-

clined to take jurisdiction over two jointly controlled and operated retail apparel stores that annually purchased out of the state a total of over $640,000 of materials.

Further, in *Hook Drugs, Inc.,* 90 N. L. R. B. No. 249, 26 Labor Relations Reference Manual (hereinafter designated L. R. R. M. 1391) (1950), the Board declined to assert jurisdiction over an employer who operated fifty-three retail drug stores throughout the State of Indiana, although the employer had purchased merchandise in an annual amount of $8,000,000, of which 98% was shipped directly from points outside Indiana. Similarly, in *Quigley's Department Store, No. 3,* 89 N. L. R. B. 381 (1950), the Board refused to take jurisdiction over an employer who operated one of seven variety five and ten cent stores in Los Angeles County, California. The employer made annual purchases of $260,000, of which 45% was shipped directly from outside the state; purchases for the other six stores of the chain totaled $441,000, of which 25% were purchased directly from outside the state. In *Hawkeye Lumber Co.,* 89 N. L. R. B. 1515 (1950), the employer was held not to be subject to the Act although he operated twenty-two retail lumber yards throughout the State of Iowa, making annual purchases of $2,000,000, of which 70% or $1,400,000 in value was purchased from outside the state. In each and all of these decisions, which are among the most recent and pertinent by the Board, the Board based its decision upon the essentially local character of the employer's business operations.

The Board on October 3, 1950, established jurisdictional yardsticks to provide definite standards for determining whether the Board will take jurisdiction of a business or whether the operations of that business are

so essentially local that the Board will not act. Under the established criteria, the Board in general determined that it would only take jurisdiction over an enterprise which makes (a) direct out-of-state sales in an annual amount of at least $25,000 (*Stanislaus Implement and Hardware Co. Ltd.,* 91 N. L. R. B. No. 116, 26 L. R. R. M. 1548 (1950)), or (b) at least $50,000 worth of sales to instrumentalities of interstate commerce (*Hollow Tree Lumber Co.,* 91 N. L. R. B. No. 113, 26 L. R. R. M. 1543 (1950)), or (c) a minimum of $500,000 in direct interstate purchases (*Federal Dairy Co. Inc.,* 91 N. L. R. B. No. 107, 26 L. R. R. M. 1538 (1950)), or (d) at least $1,000,000 in indirect interstate purchases (*Dorn's House of Miracles, Inc.,* 91 N. L. R. B. No. 82, 26 L. R. R. M. 1545 (1950)). See *Fifteenth Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1950,* pages 5 and 6 thereof.

It is clear that the business operations of Petitioners herein do not meet any one of the jurisdictional tests established by the Board itself. Accordingly, under the Board's express rulings, the activities of Petitioners' business are not subject to the Board.

Except for its decision in the instant case, the Board has consistently applied the jurisdictional standards promulgated on October 3, 1950. Thus, for example, in *McMahan's of Santa Ana and Lynwood,* 91 N. L. R. B. No. 183, 26 L. R. R. M. 1622 (1950), the Board refused to assert jurisdiction over an employer who operated a chain of four furniture stores whose out-of-state purchases equalled $161,141 of $995,665 in total purchases. In *MacFarlane's Candies,* 91 N. L. R. B. No. 194, 27 L. R. R. M. 1001 (1950), an employer who operated thirty-one retail candy stores throughout California, with

$393,000 in purchases from outside the state and $7200 out-of-state sales, was held to be outside the jurisdictional standards of the Board. Similarly, in *American Paper Co.,* 91 N. L. R. B. No. 163, 26 L. R. R. M. 1595 (1950), the Board declined to assert jurisdiction over an employer who purchased $175,000 worth of materials directly and $25,000 indirectly from outside the State.

Upon the basis of the above cited authorities, the Board cannot assert jurisdiction over Petitioners' small retail operations. Viewed in the light of these precedents and of the above cited jurisdictional standards, the essentially local character of Petitioners' business operations removes them from the scope of the Act.

D. Asserted Jurisdiction on the Basis of Alleged Participation in Association of Employers.

In its decision and order [R. 100-111], the Board recognized that it could not assert jurisdiction over Petitioners' local business activities on the basis of these activities alone. However, to create jurisdiction synthetically, the Board found that it had jurisdiction over Petitioners because of "participation in an association-wide bargaining group of employers, whose total volume of operations affect commerce within the meaning of the Act" [R. 100].

The Board erred in asserting jurisdiction over Petitioners upon the above-quoted basis, or upon any basis whatsoever, because (1) Petitioners were not members of any association of employers during any period here in issue, and (2) had Petitioners been members of such an employer association, that fact could not change the essentially local nature of the business operations involved.

1. No Employer Association Is Here Involved.

Concerning the alleged "association-wide bargaining group of employers" of which the Board found Petitioners were members, the consolidated complaint, as amended, merely alleges:

> "6(a). Respondent Federal and Respondent Lee's are members of Credit Stores Association which, on behalf of all of its members, did enter into the contract described in paragraph 8 of the consolidated complaint . . ." [General Counsel's Ex. 1-R, R. 28-29].
>
> "8. Respondent Federal and Respondent Lee's . . . on or about December 17, 1948, entered into a joint written, exclusive collective bargaining agreement with the Amalgamated Clothing Workers of America, Local Union No. 81, CIO . . ." [General Counsel's Ex. 1-J, R. 16].

Petitioners in their Amended Answer [General Counsel's Ex. 1-U, R. 30-31] denied all the allegations of paragraph 6(a) and the allegation in paragraph 8 that the agreement was "joint".

The undisputed testimony in connection with the Credit Stores Association is as follows: The association was formed in 1937 by a number of the members of the Southern California Merchants Association who had labor contracts with the A. F. of L. Central Labor Council [R. 168, General Counsel's Ex. 2, R. 199-213, 232-233]. The purpose was to attempt to keep peaceful relations, enforce the contracts, and arbitrate any differences between the companies and labor unions of the A. F. of L. Central Labor Council (*ibid.*).

In 1941, a number of the members of Credit Stores Association signed contracts with the C. I. O. while others

continued with the A. F. of L., and dissension was created among the members [R. 173-174]. Inasmuch as contractual relations with the A. F. of L. was one of the express conditions of becoming a member of the Association [General Counsel's Ex. 2-B, R. 232-233], when this A. F. of L.-C. I. O. schism developed, the Association ceased to be effective, was silently abandoned, and ceased to function thereafter [R. 167, 171-175, 230-233].

Contrary to the allegations of the complaint, therefore, Petitioners are not, and were not in December, 1948, or at any other period here in issue, members of the Credit Stores Association since that Association does not exist and has not existed since 1941. For the same reason that Association did not, as alleged, enter into the December 17, 1948, contract with the C. I. O. on behalf of its members. The facts concerning that contract are as follows: Frank Guyon,[3] an attorney and manager of the Southern California Merchants Association and one

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[3]The General Counsel and the A. F. of L. attorneys sought unsuccessfully to impeach the General Counsel's own and only witness on this phase of the case. That witness explained certain statements he may have made to the NLRB field examiner—he did not recall making them and no evidence was offered that he did—as follows: He had not had occasion earlier to consider whether or not the Association has ceased to be effective or when; without giving it a thought, he probably assumed that the Association had continued to exist; upon reflection, however, and upon consideration of the events of 1941 and later, he had to conclude that it had been abandoned in 1941 [R. 167, 168, 171-174, 229-231, 261-263].

The undisputed facts are that since 1941 there have been no meetings of "members," officers, or directors, no elections of officers or directors, no appointment of committees, no board of director's attempt to arbitrate or interpret issues of contract interpretation—one of the principal reasons for the formation of the Association—although many of such questions have arisen, and no one purporting to act as an officer or director [R. 168-170, 173-174, 257-258, 262-264].

time Secretary of the Credit Stores Association [R. 166, 168-169], had represented Petitioners, Federal and other stores for many years [R. 166]. As of the fall of 1948, Petitioners, Federal and other retail credit stores were operating under a contract with Amalgamated, dated January 31, 1947, and openable as of January, 1948 [General Counsel's Ex. 3]. During the fall of 1948, the Union representative had indicated to the various store owners and to Mr. Guyon that the employees wanted a wage increase [R. 183]. Because Mr. Guyon was going to be out of the city in January, 1949 and the stores were busy around Christmas, it was decided to attempt to conclude negotiations sometime before Christmas [R. 183-184]. Representatives from each of the stores met with Mr. Guyon to discuss the matter and asked him to gather comparative wage data [R. 184-185]. Mr. Guyon made such a study and representatives of the stores, including Petitioners, then met with Mr. Guyon again around December 10, 1948, a few days after the first meeting, and each firm representative present, including Petitioners, individually approved a scale of wages to submit to the Union [R. 185-186, 260-261].[4]

The proposed schedule was then presented to the Union representative who approved the same [R. 186]. Mr. Guyon then had a new contract with this scale typed and mimeographed [R. 186], and this was then executed on December 17, 1948 [General Counsel's Ex. 4; R. 267, 280]. At the time of these negotiations, Mr. Guyon was acting on behalf of each of the stores individually as the

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[4]No one from Browns was present, so Mr. Guyon called Browns and got an okeh to present the same wage scale on behalf of that store [R. 266-267].

labor relations attorney of each, and was paid separately by each store for this service [R. 188-189, 261-262, 265-266].

The contract is clearly not a "joint" agreement. It was executed by each store individually [General Counsel's Ex. 4, R. 214-225 at page 223], and as in the case of the 1947 contract [General Counsel's Ex. 3, R. 203-213], the agreement specifically provides (Art. XI):

> "It is understood that this agreement is executed by the Employers severally, that no signatory Employer shall be liable for any breach of this agreement by any other Employer and that no default or breach by any Employer shall constitute a default or breach by any other Employer."

The defunct Credit Stores Association is not a party to the agreement nor did it have any part in the negotiation or consummation of the same.[5]

The situation then is simply this. For a number of years several stores, varying from time to time, have negotiated individually, with the assistance of their attorney, Mr. Guyon, separate but uniform contracts. There

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[5]It is, of course, true that the opening part of the agreement states that it is a contract between the Union and "signatory members of the Credit Stores Asociation" and that immediately above the signatures appear the words "Members of Credit Stores Association." This, however, has no significance. Anyone familiar with the negotiation and drafting of contracts, knows that it is the common practice when a renewal contract is agreed upon simply to have the old contract retyped with the changes in substantive language agreed upon. Hence, it often happens that outmoded and inapt language is carried forward from contract to contract. So in the instant case, the reference to "Members of Credit Stores Association" was simply carried forward from contract to contract in copying without anyone giving a thought to deletion of the same as inappropriate [R. 261-262].

is here no association negotiating or executing contracts and no joint contract. Under such circumstances, the allegations of paragraphs 6(a) and part of paragraph 8 of the consolidated complaint, as amended, are contrary to the fact, and clearly unsupported by the evidence.

2. Lack of Jurisdiction in Any Event.

Even if the preponderance of evidence had supported a finding that the Credit Stores Association did in 1948 exist and that these Petitioners and other stores bargained through that Association, jurisdiction is not thereby conferred upon the Board, nor would its asserted jurisdiction effectuate the policies of the Act.

The fact that Petitioners belonged to and bargained through an employer association could not and would not change the essentially local character of the operation of the retail store involved. Despite that assumed fact, Lee's Department Store remains the typically small town retail department store which carries on exclusively a local business with residents of Huntington Park, California. The association of Lee's Department Store with several other independent retail stores for collective bargaining purposes would not and does not mean that its labor policies and practices could not be exercised separate and apart from those of other association members. Indeed, the evidence is uncontradicted that in 1941 the Association members differed so widely in their labor practices that (a) some members ceased recognizing the A. F. of L. Union and executed contracts with Amalgamated (C. I. O.), (b) several of such members later dropped their contracts with Amalgamated and turned again to the A. F. of L. Union, and (c) that still other

members refused to recognize Amalgamated but continued to bargain with and to recognize the A. F. of L. union [R. 173, 174]. This schism among Association members in 1941 continued thereafter [R. 174] and was the principal cause of the abandonment of the Association [R. 167, 171-175, 230-233].

Upon undisputed facts much stronger and more favorable for finding jurisdiction than anything appearing in this case, the Board has repeatedly determined that it would not effectuate the policies of the Act for the Board to attempt to exert jurisdiction over a member of a group or association of employers.

For example, in *Contra Costa Retail Druggist Association,* 90 NLRB No. 280, 26 L. R. R. M. 1412 (1950), the Board unanimously refused to take jurisdiction over an association of *twenty-nine* retail drug stores whose total annual purchases alone were in excess of $2,000,000, of which about $400,000 represented purchases of goods shipped directly from out-of-state. The Board reasoned that the operation of a retail drug store was essentially local in character.

Further in *Fehr Baking Co.,* 79 N. L. R. B. 440 (1948), the Board declined to take jurisdiction over *nine* bakeries that supplied 85% of the requirements of the city of Houston, Texas, and surrounding territory although the annual out-of-state purchases amounted to $1,470,000. In *Detroit Canvas Manufacturers Association,* 80 N. L. R. B. 266 (1948), the Board refused to take jurisdiction over an association of *ten* companies engaged in manufacturing, selling, and installing awnings and canvas tents who purchased $293,750 worth

of materials and made sales out of the state totalling $118,635.

Reviewing courts have recognized and applied the principle that mere association in a multi-plant or employer group does not change the character of a local enterprise. *National Labor Relations Board v. Shawnee Milling Company,* 184 F. 2d 57 (C. A. 10th, 1950); *Brown v. Retail Shoe & Textiles Salesmen's Union,* 89 Fed. Supp. 207 (N. D. Calif. 1950). See also *National Labor Relations Board v. Santa Cruz Fruit Company,* 91 F. 2d 790 (C. C. A. 9th, 1937), aff'd 303, U. S. 453, 58 S. Ct. 656 (1938), where the court held that the jurisdiction of the Board did not extend to a branch plant of a corporation engaged solely in intra-state activities, although the corporation, which was concededly engaged in inter-state commerce, was held subject to the original Act.

Carpenter & Skaer, Inc. et al., 90 N. L. R. B. No. 78, 26 L. R. R. M. 1223 (1950), cited by the Board in its decision and order [R. 101], is not authority for the present asserted jurisdiction over Petitioners. First, the association there involved was composed of forty-two general contractors and eighty subcontractors who performed 90% of the industrial and commercial construction in Erie County, New York, involving an annual volume of business in the amount of approximately $20,000,000, of which amount approximately $2,000,000 represented purchases of materials from outside the state and a substantial number of whose construction jobs were for firms engaged in interstate commerce. Here the alleged Credit Stores Association never comprised more than six members [R. 224-225] whose total annual

volume of out-of-state purchases was only about $750,000 [R. 101]. Secondly, there the Board asserted jurisdiction over the employer association because "the alleged unfair labor practices are attributed to the Association itself . . ."; here the Association is not charged with any unfair labor practices and none of the alleged unfair labor practices are attributed to the Association. Thirdly, there the association itself was a party to the complaint and to the proceedings; here the Association was not joined in the complaint, was not a party to the proceedings, and only two of its alleged members were before the Board.

Upon these undisputed and undisputable facts, we submit that the decision of *Carpenter & Skaer, Inc., et al.*, 90 N. L. R. B. No. 78, 26 L. R. R. M. 1223 (1950), does not authorize, and is not a precedent for, the Board's attempted assertion of jurisdiction over Petitioners in this action.

If mere association of small retail stores into a "bargaining group of employers" were sufficient in itself to give the Board jurisdiction over each of such stores, no matter how small or how local its individual activities, then there is no practicable limit to the Board's reach of power. In view of the strong movement among employers to meet the bargaining strength of unions by negotiating through association, every one of our traditionally local business activities—including the corner grocery store, the local meat market, the one-chair barber shop, the shoe shine parlor—would be swept within the ambit of Board jurisdiction upon the mere joining of several of such employers into an "association." The obvious result of such an extension of Board power over

internal business affairs would be the imposition of the Board's policies and processes upon the whole of American business life regardless of effects upon interstate commerce, the abolition of any "distinction between what is internal and what is local in the activities of commerce," and the creation of "a completely centralized government." See *National Labor Relations Board v. Jones & Laughlin Steel Corp.,* 301 U. S. 1, 57 S. Ct. 615 (1937).

We strongly urge that even if the Board is found to have jurisdiction in the instant case, its exercise of jurisdiction here will deprive Petitioners of due process of law, of equal protection of laws, and of an equal application of the Act. *Cf., Sims v. Rives,* 84 F. 2d 871 (C. A. D. C., 1936) *cert. den.* 56 S. Ct. 960, 290 U. S. 682 (1936). We have shown above that in numerous cases involving retail stores whose operations are no more local in nature than Petitioners' activities, the Board has declined to assert its jurisdiction. Some of these decisions concern retail stores in the very same county, Los Angeles County, in which Petitioners' store is located (*Squires, Inc.*, 88 N. L. R. B. 8 (1950); *Quigley's Department Store, No. 3,* 89 N. L. R. B. 381 (1950); *McMahan's of Santa Ana and Lynwood,* 91 N. L. R. B. No. 183, 26 L. R. R. M. 1622 (1950). Under such circumstances, the Board's attempt to single out Petitioners' store and to subject its activities to the Board's processes and orders constitutes an unlawful and discriminatory application of the Act which violates the constitutional guarantees of the Fifth Amendment to the Constitution of the United States.

Section 10(c) of the Act requires that a finding of an unfair labor practice must be based upon "the pre-

ponderance of the testimony taken"; a complaint must be dismissed "if upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged or is engaging in any such unfair labor practice." Concerning judicial review of Board orders, Section 10(e) and of Section 10(f) of the Act provide that upon a petition to enforce or to review an order of the Board, "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall ['in like manner' (Sec. 10(f))][6] be conclusive."

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[6]The Amended Act's requirement (Section 10(c)) that Board findings must be based upon "the preponderance of the testimony taken" changed the original Act's provision (Section 10(c)) that the Board's findings must be based upon "all the testimony taken." The Amended Act's requirement (Sections 10(e) and (10(f)) that Board findings must be supported by "substantial evidence" modified the original Act's requirement (Sections 10(e) and 10(f) thereof) that findings of the Board must be supported merely "by the evidence." The new language was adopted because of the dissatisfaction of members of Congress with some Board decisions which seemed to rest upon inadequate proof, and because of criticism from many quarters that some reviewing courts had "abdicated" to the Board by affirming Board orders which were substantiated only by "some evidence." The new provision, requiring Board findings to be supported by "substantial evidence," was intended by its framers to "very materially broaden the scope of the court's reviewing power," to "insure its [Board's] deciding in accordance with the preponderance of the evidence," and to preclude "the substitution of expertness for evidence in making decisions." *Conference Report, House Report 510,* 80th Cong., pp. 55-56; *Senate Report 105,* 80th Cong., pp. 26-27. For an excellent discussion of these matters, see *Universal Camera Corp. v. National Labor Relations Board,* 71 S. Ct. 456 (Feb. 26, 1951).

We submit that, because of the above recited facts, the findings of the Board, (a) that Petitioners' Lee's Department Store was a member of "Credit Stores Association . . . whose representatives negotiated a contract with the Amalgamated on December 17, 1948, the terms of which apply to all employees of the six employers" [R. 101] and (b) that Petitioners participated "in an association-wide bargaining group of employers" [R. 101] were not based upon the preponderance of the evidence and were not supported by substantial evidence. Indeed, the evidence is almost uncontradicted to the contrary.

For the foregoing reasons, the Board's exercising of jurisdiction over Petitioners was erroneous and illegal and its order directed against Petitioner should now be set aside by the Court. *Cf. National Labor Relations Board v. Idaho-Maryland Mines Corp.,* 98 F. 2d 129 (C. C. A. 9th, 1939); *National Labor Relations Board v. Pittsburgh Steamship Co.,* 71 S. Ct. 453 (Nov. 6, 1950); *John S. Barnes Corp.,* 190 F. 2d 127 (C. C. A. 7th, 1951).

II.

The Board's Findings of Fact Relating to the Alleged Unfair Labor Practices Are Not Supported by Substantial Evidence and the Board's Order Is Improper and Illegal.

A. The Pleadings.

Petitioners were charged in the consolidated complaint [R. 14-21] with entering into and enforcing with the Amalgamated union a so-called union shop contract. The allegations of the complaint as amended (disregarding the allegations which were dismissed) are contained principally in paragraph 8, which provides (changing it to the singular and omitting reference to the other respondent below, Federal Stores Division of Spiegel, Inc.):

> "Respondent Lee's, by its officers, agents and employees while engaged in its business as described in paragraphs 3 and 4, above, on or about December 17, 1948, entered into a . . . written exclusive collective bargaining agreement with the Amalgamated Clothing Workers of America, Local Union No. 81, CIO, covering wages, rates of pay, hours of employment and other conditions of employment of Respondent Lee's employees; which agreement provided, in part, as follows:
>
> > "'ARTICLE V, MEMBERSHIP IN UNION
> >
> > "'1. Members of the Employers' families, store managers, one head book-keeper, one stenographer-secretary, and bona fide department heads who have the duty of directing the work of two or more employees in their respective departments, shall not be subject to

the jurisdiction of the Union and shall be excepted from all provisions of this agreement.

"'2. Subject to the exceptions specified in paragraph 1 of this Article, all full-time employees at present employed in the classifications specified in Article II, shall become members of the signatory Union within fifteen (15) days after the effective date of this agreement or shall be discharged by the Employer.

"'3. Subject to the exceptions specified in paragraph 1 of this Article, all full-time employees in the classifications specified in Article II and who are hired after the effective date of this agreement shall become members of the signatory Union within 30 days after the date of their employment or shall be discharged by the Employer.'

"At all times since on or about December 17, 1948, Respondent Lee's and Amalgamated Clothing Workers of America, Local Union No. 81, CIO, have enforced and given effect to said agreement and all renewals and extensions thereof and have required membership in the Amalgamated Clothing Workers of America, Local Union No. 81, CIO, as a condition of employment."

Union shop contracts are not *per se* illegal under the Act, and paragraph 8 of the amended complaint does not allege that there was any illegality merely because of the execution and enforcement of a union shop provision. Under Section 8(a)(3) of the Act, union shop conditions are made illegal under only any one of three circumstances: (1) when the Union contracting party was "established, maintained, or assisted by any action

defined in section 8(a) of this Act as an unfair labor practice"; (2) if the Union is not "the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made"; or (3) if the following condition has not been satisfied: "following the most recent election held as provided in section 9(e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement." In the instant case the agreement is claimed to be illegal under the third condition, paragraph 12 of the complaint alleging in this connection that the agreement "is illegal and invalid" "by reason that no union authorization election in accordance with Section 9(e) of the Act has been held."

The execution and enforcement of the agreement and the lack of a so-called UA election have been admitted by Petitioners [General Counsel's Ex. I-U; R. 31]. Nevertheless, even assuming the applicability of the Act to Petitioners, we submit that the evidence does not support the findings of the Board that Petitioners violated the Act.

B. Inadequacy of Charge.

Prior to the amended Act, it was the regular practice of the Board to issue complaints which were broader than the charge. We submit, however, that the amendments enacted into the amended Act now make that improper.

Under Section 10(b) of the Act, as amended, "no complaint shall issue based upon any unfair labor prac-

tice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made." What is the purpose of such a provision? Obviously, to permit a person to know that he is being charged with having committed certain illegal acts so he can preserve his evidence. This is made clear by the Report of the House Committee on Education and Labor on the Taft-Hartley Bill (H. R. 3020):

> "A more important change is one that requires charging parties to file their charges within 6 months after the unfair practice is alleged to have occurred, and that requires the administrator to issue the complaint within 6 months after the charge is filed. It has not been unusual for the Board, in the past, to issue its complaints years after an unfair practice was alleged to have occurred, after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused." (*H. Rep. No.* 245, 80th Cong. 1st Sess., April 11, 1947, p. 40.)

If the service of the charge is to furnish the person charged with sufficient information to be able to collect and preserve his evidence, obviously the charge must contain allegations of specific illegal acts. Furthermore, if this were not required, the proviso of Section 10(b) could be circumvented simply by the service every six months of a printed form charging in the most general language violations of each provision of the Act. Clearly, therefore, if the proviso is to be satisfied, the charge must specify with some particularity the acts of illegality.

In the instant case, the charge [General Counsel's Ex. 1-G; R. 9-12] does in some detail allege a violation

of Section 8(a)(3) but alleges in only the most general terms a violation of Sections 8(a)(1) and 8(a)(2) of the Act. It makes no reference to any agreement or union shop conditions or the lack of any so-called UA election. Under such circumstances, we submit that the Board improperly issued its complaint charging Petitioners with a violation of the Act by entering into and enforcing a union shop contract without a Section 9(e) election. Such allegations should, therefore, have been dismissed and the Board's order based thereon is, we submit, illegal.

C. Bar of Statute of Limitations.

Assuming the sufficiency of the charge so far as detail is concerned, nevertheless the allegations of the complaint should have been dismissed, and the Board's order based upon such allegations is illegal, because the charge was not served within the six months period prescribed in the proviso in Section 10(b) of the Act.

It is clear that the mere execution of a contract containing an illegal union security condition constitutes at that time a violation of the Act. *Great Atlantic & Pacific Tea Co.,* 81 N. L. R. B. 1052 (1949); *C. Hager & Sons Hinge Mfg. Co.,* 80 N. L. R. B. 163 (1948); *Julius Resnick, Inc.,* 86 N. L. R. B. 10 (1949). The agreement here involved was executed on December 17, 1948 [General Counsel's Ex. 4; R. 214]. Assuming for purposes of argument that it contained illegal union security provisions, Petitioners violated the Act in this respect on December 17, 1948. To challenge this illegality, a charge would have to have been filed *and served* not later than June 17, 1949. However, the Board found that the charge against Petitioners was not served until

June 21, 1949 [R. 40]. It was not, therefore, served in time, and these allegations of the complaint should have been dismissed by the Board.

It is no answer to this necessary conclusion to contend that the union shop conditions constituted a continuing violation. If such an argument were sound, the statute of limitations provision would be a nullity. In a similar situation the Board has clearly rejected such a contention. In *Goodall Co.*, 86 N. L. R. B. 814 (1949), the Board approved the intermediate report which read, in part, as follows (page 32):

> "On July 12, 1948, the Respondent granted a 10% wage increase to all of its employees at the Talladega plant. The General Counsel contends that it was designed to discourage membership in the Union. For the reasons set out below, a determination of that question is unnecessary.
>
> "The charge was filed on January 19, 1949, more than six months after the increase became effective, and the question arises whether the statute of limitations contained in Section 10(b) bars the issuance of a complaint based on the rise in wages. It may be asserted that where a wage increase violates Section 8(a)(1), it constitutes a continuous violation because it is reflected in weekly or other recurring salary payments, periodically reminding employees that they do not need the assistance of a union or of collective bargaining, and thus constitutes a continuing interference with the employees' right of self organization. The examiner does not agree with that view. If tenable with respect to a wage increase, the theory should apply equally to a discriminatory discharge, for an unlawful dismissal

> affects not only the employee involved, but is often a continuing discouragement of union activities by other employees. Yet, there is no doubt that the six-month limitation for the filing and service of a charge based upon a discriminatory discharge begins to run from the date of the discharge. In the opinion of the Examiner, the averments of the complaint pertaining to the wage increase are based because the charge was filed more than six months after the increase became effective. The Examiner will recommend that such allegations be dismissed."

The above observations apply equally to the execution and enforcement of an illegal union shop contract.

We submit, therefore, that the Board's findings of fact and its order are unlawful because the charge against Petitioners was filed too late.

D. No UA Election Was Required.

The agreement of December 17, 1948, did not impose union shop conditions. The identical union shop provisions were contained in the agreement of January 31, 1947 [General Counsel's Ex. 3; R. 207]. Since that agreement was prior to the passage of the amended Act, the union shop conditions therein were perfectly valid and legally effective after the passage of the Act (Sec. 102 of Act). Artivle XII of that contract, in effect, provided for the continuance of the contract to January 31, 1950, with a wage reopening provision as of January, 1949 [General Counsel's Ex. 2-B; R. 203, 212]. The agreement of December 17, 1948, was merely an amendment of the 1947 agreement upon the wage-reopening. *It only changed the wage rates in the 1947*

contract. The union security provisions and other terms of the 1947 contract were not changed in any way.

Certainly, if the parties had merely signed a wage supplement to the 1947 contract, the union shop conditions therein would have continued to be valid. *Cf. Greenville Finishing Co.,* 71 N. L. R. B. 436 (1946). We do not believe that because they chose to retype the agreement and incorporate the changed wages in the same document the legal effect should be different and the union shop conditions held illegal. Substance, not form, must control. Hence, the union shop provisions in the December 17, 1948, contract are not illegal, and the finding of fact of the Board that such provisions were unlawful is without support in the record.

We submit, therefore, that the Board's findings of fact respecting Petitioners are not supported by substantial evidence and its order directed against Petitioners is unlawful because (a) the charge filed against Petitioners upon which the complaint was based was so vague and general as not to apprise Petitioners of the alleged illegal acts; (b) the complaint, the Board's findings of fact and its order are barred and void because the charge was not filed within the six months period prescribed by Section 10(b) of the Act; (c) union shop provisions were not imposed by the agreement of December 17, 1948, but were imposed by the agreement of January 31, 1947; the latter agreement having been made prior to the passage of the amended Act, its union shop conditions and their enforcement were valid and legally effective during all the times mentioned in the complaint.

III.

The Board Erred in Refusing to Dismiss the Entire Proceedings for Failure of General Counsel to Join Amalgamated as a Party Respondent.

The union shop conditions in the contract which the Board found unlawful in its decision and order [R. 102], were inserted at the request of the Amalgamated Clothing Workers of America, Local Union No. 81, C. I. O. and obviously the Amalgamated was the chief and sole beneficiary of the contract [R. 269]. Clearly, therefore, if these contract provisions are illegal, the principal offender is the Amalgamated and General Counsel should have proceeded jointly against that union.

Amalgamated is named as a "Party to the contract" in the consolidated complaint [General Counsel's Ex. 1-J; R. 13]. However, no charge was filed against Amalgamated [General Counsel's Exs. 1-A and 1-G; R. 3, 9]. The consolidated complaint neither named the Amalgamated as a party respondent nor complained of any act or action of Amalgamated [General Counsel's Ex. 1-T; R. 13-21]. Amalgamated filed no answer to the consolidated complaint [R. 142, 143]. The order of the Board does not run against, and is not directed to, Amalgamated in any way [R. 101-111].

These Petitioners (respondents in the proceedings before the Board) moved the Trial Examiner to dismiss the proceedings for failure of General Counsel to join the Amalgamated as an indispensible party respondent to the proceedings [R. 151]; this motion was denied [R. 152].

The order of the Trial Examiner denying said motion of Petitioners and the affirmance of such order by the Board constituted fatal errors which, we submit, invalidated the whole proceedings. The Amalgamated was a necessary party respondent in the Board action for, as we have said, it was the chief beneficiary and the initiator of the contract which the Board has declared invalid. The Board's order and decision destroys the contract of Amalgamated and casts the entire blame for the contract's execution and enforcement upon Petitioners, although Amalgamated was not put to proof to sustain the agreement or otherwise made to defend its previous participation in the making and enforcing of the contract. Under such circumstances we submit that the Board lacked jurisdiction over the subject matter of the agreement which its order declares illegal, and that Petitioners were denied due process of law and the "basic concept of fair play" in the proceedings below. *Cf. National Labor Relations Board v. Portland Cement Co.,* 108 F. 2d 198 (C. C. A. 9th, 1939); *Consolidated Edison Co. of New York, Inc. v. National Labor Relations Board,* 305 U. S. 197, 59 S. Ct. 206 (1938).

Conclusion.

It is submitted that the Board's order relating to Petitioners is illegal, void and unenforceable because (a) the Board has and had no jurisdiction over Petitioners, (b) its findings of fact relating to the alleged unfair labor practices charged against Petitioners are not supported by substantial evidence, and (c) the Board fatally erred in not dismissing the complaint against Petitioners for failure of General Counsel to join the Amalgamated Union as an indispensible party respondent in the Board proceedings. The Board's decision and order (except that portion of the order dismissing the complaint insofar as it alleges that Petitioners committed unfair labor practices by checking off the Amalgamated dues from the pay of their employees) should be set aside by order of this court and Petitioners, their agents, successors, and assigns, should be relieved from the necessity of complying therewith.

Dated: September 12, 1951.

Respectfully submitted,

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APPENDIX A.

National Labor Relations Act, as Amended.

The pertinent provisions of the National Labor Relations Act, as amended [61 Stat. 136, 29 U. S. C. Supp. III, Secs. 151 *et seq.*] are as follows:

Section 2. When used in this Act—

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

(8) The term "unfair labor practice" means any unfair labor practice listed in section 8.

Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities

for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 8.(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to Section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when

made; and (ii) if, following the most recent election held as provided in section 9(e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement. . . .

Section 10.(a) The Board is empowered as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. . . .

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. . . . . Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723-B, 723-C).

(c) . . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. . . . If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

(e) The Board shall have power to petition any circuit court of appeals of the United States . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the

order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceedings, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter

a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

Section 102. No provision of this title shall be deemed to make an unfair labor practice any act which was performed prior to the date of the enactment of this Act which did not constitute an unfair labor practice prior thereto, and the provisions of section 8(a)(3) and section 8(b)(2) of the National Labor Relations Act as amended by this title shall not make an unfair labor practice the performance of any obligation under a collective-bargaining agreement entered into prior to the date of the enactment of this Act, or (in the case of an agreement for a period of not more than one year) entered into on or after such date of enactment, but prior to the effective date of this title, if the performance of such obligation would not have constituted an unfair labor practice under section 8(3) of the National Labor Relations Act prior to the effective date of this title, unless such agreement was renewed or extended subsequent thereto.